IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 533 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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MUKHTIAR MOHAMMED SHAIKH

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 533 of 1998

MR MH BAREJIA for Petitioner No. 1

MR PM VYAS for Petitioner No. 1

MR HIREN P VYAS for Petitioner No. 1

MS REKHA H KAPADIA for Petitioner No. 1

MR HH PATEL,APP for Respondent No. 1

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 23/04/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE KSHITIJ R.VYAS)

1. The appellant in this appeal has challenged the judgment and order dated 28.4.1998 passed by the learned Addl. City Sessions Judge, Ahmedabad in Sessions Case No. 169 of 1997 convicting him for the offence punishable under section 21 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act')and sentencing to suffer R.I. for ten years and to pay a fine of Rs. 1 lac, in default, to undergo further R.I. for six months.

2. The prosecution case can be briefly stated as under:

On 1.6.1997, Police Constable Mavsing Bhiming had given information to Police Inspector Gohil that one person named Mukhatiar Mahmad Shaikh (the appellant) has been indulging in selling brown sugar by keeping small packets with him at Dariyapur, Near Dadamiya's Gali, in the City of Ahmedabad. The said information was reduced in writing and the superior officer was informed immediately. Two panchas were called and they were made to understand as to for what purpose they were called. After preparing preliminary panchanama, raid was carried out. It is further the case of the prosecution that during the course of search of the person of the appellant, from one pocket of his pant, 350 mg. and from another pocket, 6800 mg. brown sugar was found. It was attached in presence of panch witnesses and seizure memo was given and then panchanama was completed. The appellant was arrested immediately and complaint was lodged. At the time when the complaint was lodged, muddamal was handed over to Crime Writer Head Constable and the sample was sent to FSL for examination and it was found that the substance was narcotic drug. The appellant was prosecution by filing chargesheet before the Court.

3. The learned trial judge framed charge Ex. 2 for offence punishable under section 10(1)(a)(iii) read with section 21 of the Act. The appellant denied the charge. The prosecution has examined seven witnesses and documentary evidence has also been produced on record. The learned trial judge, after appreciating the evidence including further statement under section 313 of the Code of Criminal Procedure, convicted the appellant and passed the order of sentence as stated above. Hence the present appeal.

4. Learned advocate appearing for the appellant,

after taking us through the entire evidence on record, submitted that the prosecution has failed to establish the charge levelled against the appellant inasmuch as Dilip Ranchhodbhai, panch PW 2 Ex. 19 who has been examined as an independent witness, has not supported the prosecution case and was declared hostile. In the submission of learned advocate, when independent witness examined by the prosecution has not supported the case of the prosecution, no reliance can be placed on the deposition of police witnesses. It was further contended that the breach of mandatory provisions of section 55 of the Act is committed inasmuch as the muddamal has not been preserved by the PSO Kuberbhai, PW 4 Ex. 20 and on the contrary, Crime Writer Head Constable Vasudev Chandulal, PW 5 Ex. 24 retained the custody of muddamal which is against the provisions of law. It is contended that the information which was received by the complainant PI Gohil who claimed to have reduced the same in writing in the police station diary and also sent the report thereof to superior officer Mr.Jhala, the said Mr. Jhala is not examined and, therefore, it cannot be believed that he had received the information in question as stated by Mr.Gohil. Finally, it was submitted that from the report of FSL, it does not transpire that the drug or the substance found was brown sugar as no such word has been written by the expert of FSL. In the circumstances, it was submitted that since the report of FSL is not clear, no reliance can be placed on the evidence of police officers.

Mr. H.H.Patel, learned APP, on the other hand, supported the judgment of the trial court in toto.

5. The complainant Mr.Gohil, Ex. 10, in his evidence, has stated that while he was on duty on 1.6.1997, at about 9.30 hours, police constable Mavsing Bhimsing had given information that one person named Mukhtiar Mohmmed Shaikh, residing at Chhaya Colony, Shah Alam wanted by Maninagar Police Station in narcotic offence, having put on navy blue colour pant with small pakcets of brown sugar in his pant pockets, was selling brown sugar at the corner of Dadamiya Gali, Behind Cycle Cabin. It was also stated that he was fair in skin and had combed his curly hair and had also put on bushshirt with checks of navy blue colour. The complainant Mr. Gohil made an entry in the station diary which is on record at Ex. 11. He also informed his superior officer about the information he received and requested him to join in the raid. A secret report Ex. 12 was also made. Original Ravangi Book is produced at Ex. 17 which bears the signature of Mr. Jhala. The complainant Gohil

thereafter called his subordinate officer and made an arrangement to call panch witnesses. On their arrival, they were made to understand about the raid and thereafter the raid was carried out. As per the information received by the complainant, the appellant was found at the spot. He was informed about the raid and also the purpose for which he was to be searched and then option was given to him and the search was made and muddamal, as stated above, was recovered. He had given the details of search, seizure and sealing of the muddamal recorded in the panchanama. Thereafter, he lodged complaint and the muddamal was handed over to PSO Kuberbhai who was on duty. He also sent forwarding letter to FSL vide Ex. 18 with sample muddamal.

On going through the lengthy cross examination of the complainant, we do not find anything substantial having been brought out by the defence. Nothing is pointed out about the breach of mandatory requirements of the Act nor any discrepancies in the evidence of the complainant.

6. The complainant is amply supported by PSI Lalubha Jhala who is examined at Ex. 20. It is stated by him that he was made to understand about the information received by Mavsing and accordingly, he was asked to remain present in the raid and thereafter the raid was carried out. He has further stated that the raiding party had offered the search of their person to the accused, but he had not preferred to do so. It is stated by him that the appellant was asked to give option whether he would like to be searched in presence of a gazetted officer or a Magistrate and then the search was carried out and muddamal brown sugar was recovered from the appellant. He has further stated that the muddamal was weighed and certificate was issued which is said to have been placed in the muddamal papers itself. It has been identified by Mr. Gohil during the course of his deposition. He also carried out the process of sealing, signing and packing of muddamal.

7. Kuberbhai Parshottamdas, serving as PSO is examined vide Ex. 21. He has registered the offence on the basis of the report under section 157 given by the complainant to him. He has stated that the muddamal was handed over to him by complainant Mr. Gohil and he had preserved the same. According to him, he had handed over the same to Crime Writer Head Vasudev Chandulal Ex. 24 in the next morning. Vasudev Chandulal has stated that on 2.6.1997, at about 9.15 p.m., he had come to his duty and at that time, Police Head Constable i.e. PSO had

handed over muddamal to him. It is stated that there were three sealed packets of muddamal handed over to him. He had made entry of the same in the register and it was kept in his safe custody and on 4.6.1997, muddamal was handed over to Police Constable Yusuf, Ex. 26 who in turn, handed over the same to FSL. It was brought back and then again it was sent to Sessions Court. Yusuf, Ex. 26, in his deposition, has confirmed the say of Vasudev. He has stated that on 4.6.1997, he was on duty at Dariapur Police Station and muddamal was handed over to him for the purpose of handing over the same to FSL. It is stated that the receipt was issued by the FSL and the same was given by him to Investigating Officer Mr. N.B.Raval, Ex. 32. PSI Raval has also stated in his evidence that the muddamal was sent to FSL. He identified Ex. 18 with his forwarding letter and the muddamal received by him from FSL which was produced by him.

8. The above referred evidence will go to establish that the prosecution, in the instant case, has scrupulously followed the provisions of Section 41 and 50 which are mandatory in nature. True, in the instant case, the panch has not supported the case of the prosecution. However, that fact by itself cannot be a ground to discard the evidence of police officials. After having carefully scrutinised the evidence on record, especially the evidence of Mr. Gohil and Mr. Jhala who were present at the time of raid and especially when nothing has been pointed out to reject their evidence, their evidence cannot be discarded simply on the ground that they are police officers.

9. Dealing with the contention raised on behalf of the appellant that no reliance can be placed on the information which was received and reduced in writing in the police station diary in view of the fact that the same was in possession of Mr. Gohil and Mr.Jhala to whom the report was made, has not been examined, it cannot be believed that the complainant had received said information. We can only say that we are not impressed with the said submission.

10. The complainant Mr.Gohil, while following the requirement of section 42 which is mandatory in nature, reduced the information in writing in police station diary Ex. 11. It contains complete details received by Head Constable Mavsing. The complainant Mr. Gohil, in his evidence, has stated that the said information was reduced in writing in his own handwriting which gives complete details. From the said information itself, it

is clear that the appellant was dealing in narcotic drugs. Merely because the police station diary remains in the custody of the concerned police station, the said fact by itself, cannot be a ground to discard Ex. 11, the entry made in the station diary. Similarly, merely because Assistant Commissioner of Police Mr.Jhala who was conveyed the information by Mr.Gohil vide report Ex. 12 is not examined, by that fact itself, we cannot discard the evidence of Mr. Gohil. The said information which was reduced in writing in the station diary was conveyed to him vide Ex. 12. It was written on 1.6.1997 by complainant Mr. Gohil, Senior PI of Dariyapur Police Station. It was also received on the very same day night at 20.45 hours. Not only that, Mr. Jhala, as one of the members of the raiding party, had remained present at the time of raid. Therefore, merely because the said Mr. Jhala, Assistant Police Commissioner is not examined in the instant case, the evidence of complainant Mr. Gohil does not become doubtful as it is clearly established by oral as well as documentary evidence that Assistant Commissioner of Police Mr. Jhala was, in fact, conveyed the information received by complainant Mr. Gohil.

11. Dealing with the last contention, namely that it does not transpire from the report of FSL that the drug or substance found was brown sugar as no such word has been written by the expert of FSL, we are of the view that there is a misconception in the mind of the learned advocate for the appellant. On going through Ex. 33 which is a report of FSL, it is opined that the substance was having morphine, diacetylmorphine, codeine,Acytyle codeine, Acytyle morphine, Papavrin and narcotiene. Whether it can be said to be a narcotic drug or not is a question. It is clear from the definition given in section 2 (xvi)(c) in which it is stated that "Opium derivative" means phenanthrene alkaloids, namely, morphine, codeine, thebaine and their salts. It is also mentioned in clause (e) that "opium derivative" means all preparations containing more than 0.2 per cent of morphine or containing any diacetylmorphine. From this definition, it is clear that the opinion of the FSL is positive. The word "brown sugar" is not a scientific or chemical terminology, but the substance is popularly known as "brown sugar". When components have been stated by the Scientific Officer of FSL in his report Ex. 33, we are convinced beyond any manner of doubt that the substance found was narcotic drug as defined under the Act. We, therefore, see no merit even in this submission.

12. Thus, considering the matter from all angles and

taking the overall view of the matter, we are of the opinion that the learned trial judge has not committed any error in convicting the appellant for the offence for which he was charged. Suffice it to say that we are in total agreement with the reasonings and the ultimate conclusion recorded by him. We, therefore, see no merit in this appeal and the same is dismissed.

(Kshitij R.Vyas,J.)

(Ravi R.Tripathi,J.)

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